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No. 06-618

IN THE

Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. The sole merits issue in this case is whether Congress can enact legislation giving its own employees the right to go to court to challenge perceived violations of statutes governing employment. This depends in part on whether routine personnel decisions, such as hiring and firing, can fairly be characterized as legislative acts.

2. Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court?

3. Was this case rendered moot by the expiration of the term of office of Senator Dayton?

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STATEMENT

1. *Introduction.* Appellant seeks to undermine the Congressional Accountability Act's key reform—judicial enforcement of workplace claims by congressional employees. According to appellant, the Constitution's Speech or Debate Clause forbids Congress from providing a judicial forum to staffers with legislative duties—the bulk of the employees in Members' offices and on committee staffs—and the very workers whom Members actually supervise. If appellant had its way, the only employees protected by the Act would be the minority of legislative branch workers who have no contact with legislation, such as the waiters in the Senate dining room.

Appellant moved to dismiss this case immediately after the complaint was filed, so there has been no discovery. The sole issue at this early stage is whether Congress can vest Federal courts with jurisdiction to hear employment-related claims brought by its own employees, which turns on whether routine personnel decisions such as hiring and firing are legislative in nature. Appellant says they are, but this view is contrary to the decisions of this Court on the Speech or Debate Clause and similar privileges, and no court of appeals has agreed with appellant's argument. Congress has the authority, consistent with the Clause, to give its own employees access to the judiciary to test their claims of workplace violations.

2. *Proceedings.* Appellee Brad Hanson, a former member of Senator Mark Dayton's staff in Minnesota, sued appellant Office of Senator Dayton in May 2003 under the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1301 *et seq.*, claiming that he was fired in July 2002 immediately after informing the Senator that he needed cardiac surgery. Hanson alleged that his firing violated the Family and Medical Leave Act, 29 U.S.C. §§ 2611 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*,

both of which the CAA makes applicable to congressional offices. 2 U.S.C. §§ 1302(a)(3), (5). Hanson also said that he was denied overtime pay in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which likewise applies to Congress under the CAA. 2 U.S.C. § 1302(a)(1).

Senator Dayton's Office filed a motion to dismiss, claiming immunity from suit under the Speech or Debate Clause of the Constitution, Art. 1, § 6, cl. 1. After full briefing, the district court in September 2004 entered a minute order denying the motion, after which the Office answered the complaint. *See* Appendix bound with Jurisdictional Statement (S.J. App.) at 9a n.5.[1] Appellant then appealed to the Court of Appeals for the District of Columbia Circuit, which consolidated this case for *en banc* argument with another appeal involving the Speech or Debate privilege, *Fields v. Office of Representative Eddie Bernice Johnson*, No. 04-5315 (D.C. Cir.). In August 2006, the court unanimously decided that the Speech or Debate Clause does not bar suits under the CAA and affirmed the orders denying dismissal in both *Hanson* and *Fields*.

Eight judges sat on the *en banc* court. Judge Randolph's opinion for five judges was the opinion of the court on most issues, but Judge Rogers declined to concur on one—the proper treatment of the Speech or Debate Clause's evidentiary privilege—and wrote a separate opinion. Judge Tatel, who joined Judge Randolph's opinion, also wrote a concurrence. Judge Brown wrote an opinion concurring in the judgment for three judges.

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[1] Owing to a miscommunication, appellant's answer to the complaint was omitted from the parties' Joint Appendix, and it is reprinted in the appendix bound with this brief (Br. App.).

3. *Facts.*[2] Brad Hanson joined Mark Dayton's Minnesota Senate campaign in July 2000. He designed and ran a successful advocacy program, the Health Care Help Line, which offered assistance to Minnesotans having difficulties with their health insurance carriers, HMO's or physicians. After Senator Dayton was elected, Hanson joined his staff as the State Office Manager in Minnesota and set up the Senator's three offices in the state, as well as managing the transition of the Health Care Help Line to the Senate office. Hanson worked a substantial amount of unpaid overtime and performed all his assignments capably.

Early in 2002, Hanson began experiencing cardiac arrhythmia and was told that he needed a coronary ablation, which would entail a short hospitalization and a recovery period of two to three weeks. He told others on the staff but also wanted to inform Senator Dayton personally and spoke to the Senator when he was in Minnesota on July 3, 2002. Senator Dayton summarily fired Hanson during the meeting.

During his tenure on Senator Dayton's staff, Hanson spent the vast bulk of his time on administrative matters and constituent services, especially managing the Health Care Help Line. In its answer to the complaint, the Senator's Office said that Hanson was fired because of claimed deficiencies in his work on the Help Line: "Senator Dayton . . . informed Mr. Hanson that . . . [the Senator] had concluded that the [Health Care Help Line's] problems were caused by Mr. Hanson's poor performance and that Mr. Hanson . . . had to leave the Office." Br. App. 5a, ¶ 10. Hanson disputes any criticism of his performance on the Health Care Help Line but, in any event, his management of the Help Line was a

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[2] Except as indicated, the facts set forth in this section are taken from the complaint, which appears in the Joint Appendix (JA) at 10, and whose allegations must be accepted as true because the immunity defense was raised in a motion to dismiss. *Clinton v. Jones*, 520 U.S. 681, 685 (1997).

constituent service—casework—that all congressional offices perform and is not legislative in nature.

SUMMARY OF ARGUMENT

The crux of this case is whether the Congressional Accountability Act—in particular, its single most significant reform, judicial enforcement—can co-exist with the Speech or Debate Clause. Appellant says no, at least not with respect to the many congressional employees having legislative duties. But the Act's text and structure show that Congress intended to cover *all* its employees, and the District of Columbia Circuit properly concluded that it was lawful to do so.

1. The Speech or Debate Clause grew out of the sometimes violent battles between Monarch and Parliament, in which Members were jailed for criticizing the executive on the floor of the House of Commons. The Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." Its root purpose is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary," *United States v. Johnson*, 383 U.S. 169, 181 (1966), and it is essential to legislative independence.

The Clause protects legislative acts, those within "the sphere of legitimate legislative activity." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). Members of Congress are absolutely immune from challenges to their activities within that sphere, and the Clause also provides an evidentiary privilege that allows Members to refuse to testify about legislative acts even when they are properly in court.

Merely being related to legislative procedures, however, is not enough to convert an action by a Member of Congress into a legislative act: "in no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process." *United States v. Brewster*, 408 U.S. 501, 515

(1972) (emphasis original). Instead, "[t]he heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

2. Routine personnel decisions, *e.g.*, hiring, firing, promotion, are not legislative acts. Appellant argues otherwise, contending that a Member's management of his legislative staff is necessary to the production of sound legislation. That seems a stretch, and the Court has confirmed that it is: "We would not think it sound or wise . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. If that were done, "we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.*

The Court has not addressed personnel decisions in the context of the Speech or Debate Clause, but it has examined them in the analogous setting of judicial privilege. Like the legislative privilege, which is absolute within the legislative sphere, judicial privilege is absolute within the judicial realm. But in *Forrester v. White*, 484 U.S. 219 (1988), the Court held that personnel decisions made by a judge were administrative in nature, not judicial, and so were not shielded by judicial privilege: "Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts . . . may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." *Id.* at 229.

The only decision ever to adopt appellant's theory was *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d

923 (D.C. Cir. 1986). All eight members of the *en banc* court below agreed that *Browning* was wrongly decided and should be overruled.

3. Passage of the Congressional Accountability Act marked a sea change in the way Congress does business. In the decades before the Act, Congress routinely exempted itself from the workplace obligations it imposed on the public at large with statutes like the Fair Labor Standards Act and Title VII. In the CAA, however, Congress turned about face, applying some eleven labor and employment laws to the legislative branch.

Both the text of the CAA and its history show Congress' intention to cover *all* legislative branch workers, including the many employees with legislative tasks whom appellant contends may not be reached. Congress was sensitive to concerns about the separation of powers and for that reason expressly deprived the executive of any role under the CAA. But the Members saw judicial enforcement—*i.e.*, granting congressional employees a private right of action to enforce their rights—as the Act's core reform, and Congress expressly decided that the Speech or Debate Clause was not a barrier here. The congressional view is of course not dispositive, but "the interpretation of its powers by any branch is due great respect from the others," *United States v. Nixon*, 418 U.S. 683, 703 (1974), especially where a branch (here the legislative) acted after "weigh[ing] competing constitutional interests in an area in which it enjoys particular expertise," *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003).

Congress wrote the executive out of the Act, but it decided that judicial enforcement would not pose a threat to its independence and was essential to giving its own employees the same rights as other American workers. That judgment, which is still shared by both the Senate and the House of

Representatives, as is evident from the *amicus* briefs submitted in this case, should be respected.

4. The opinions below set forth two approaches to resolving the Speech or Debate issue. The judgment can be sustained on either, but in fact both have merit. Judge Randolph's opinion for the court assumes that the defendant in this case—the Office of Senator Mark Dayton—is itself protected by the Clause. But since Hanson's complaint did not challenge legislative acts, the district court had jurisdiction to decide the case.

Judge Brown's opinion concurring in the judgment differs with Judge Randolph's premise. She does not believe that the Office is protected by the Speech or Debate Clause in the first place, and so there is nothing to stop a court from asserting jurisdiction over a claim naming the Office as the defendant. There is much to commend Judge Brown's analysis. In particular, there are many factors indicating that Congress is the real party in interest, not the Office of Senator Dayton, which is simply a stand-in for Congress, a legal fiction unprotected by the Speech or Debate privilege.

Among the factors supporting Judge Brown's approach are that CAA litigation is defended by institutional counsel; the Act defines "covered employee" as (among other things) an employee of the Senate, rather than a particular employing office; the Act provides that all employees are eligible for damages of a magnitude only available against employers with more than 500 employees, a threshold met by Congress itself but not by Members' offices; settlements do not become effective until approved by the Executive Director of the Office of Compliance, an office within Congress; and the Act creates a special judgment fund to satisfy awards and settlements, and the fund is available to pay judgments after a Member leaves Congress.

If Judge Brown is right that the Office is not subject to the Clause, that ends the matter. It is not necessary to reach that issue, though, because Judge Randolph correctly saw that this case does not implicate legislative acts.

The court below did not reach a decision on how the evidentiary privilege should play out in this case, but that would have been premature for a lawsuit in its infancy, where no discovery has yet been taken. Judge Tatel, concurring below, believed that questions about the proper application of the evidentiary privilege will be "more easily answered after further factual development," and he noted that all members of the *en banc* court agreed that "the question of what precisely the Clause precludes is best resolved on a case-by-case basis." J.S. App. 31a.

In any event, further litigation in this case is unlikely to go anywhere near legislative acts, because appellant's reason for firing Hanson—ostensibly poor performance managing the Health Care Help Line—does not involve matters that are legislative in nature. The Help Line was a legitimate constituent service—assisting people who had problems with their health insurance carriers, HMO's or physicians—but it was not in the legislative sphere. Instead, it was among the "wide range of legitimate 'errands' performed for constituents" that are "political in nature rather than legislative." *Brewster*, 408 U.S. at 512.

5. The appeal should be dismissed. The decision below does not satisfy the standards of the direct appeal statute, 2 U.S.C. § 1412, because Judge Randolph's opinion for the court does not decide "the constitutionality of any provision" of the CAA. Certiorari should also be denied, because appellant does not meet the standards of the Court's Rule 10—there is no division in the circuits, and the D.C. Circuit scrupulously followed the Court's Speech or Debate Clause and related precedent. Certiorari is, however, more flexible than the appeals process, and appellee believes that, should

the Court wish to review this case on the merits, certiorari is the better vehicle. *See* Brief for the United States Senate as *Amicus Curiae* at 12.

Finally, this case is not moot. The expiration of a Member's term of office does not moot a case so long as there is a live dispute for which relief can be provided. *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Powell v. McCormack*, 395 U.S.486, 498 (1969). Hanson stipulated that he was not seeking reinstatement before Senator Dayton announced that he would not run for reelection, but the parties seriously dispute Hanson's entitlement to back pay or damages. As is evident, appellant is vigorously represented by counsel provided by the Senate. And if Hanson prevails, there is a fund available to satisfy the judgment. These are not factors associated with a moot case.

Appellant assumes that when Senator Dayton left the Congress, the Office of Senator Dayton ceased to exist. But the Office is a term of art created expressly for purposes of the CAA, a "legal fiction" in the words of former Congressman Henry Hyde. The Act does not state or in any way imply that a district court's jurisdiction is extinguished on the last day of a Member's term of office. In particular, nothing in the language creating the special judgment fund says that the fund may not be used to satisfy judgments after a Member leaves office.

We mentioned above the ample support for Judge Brown's theory that Congress—not the employing office—is the real defendant in a CAA case. It is not necessary to subscribe in full to see that Congress provided several mechanisms (*e.g.*, institutional counsel, the availability of a judgment fund) to insure that cases would not be mooted by the expiration of a Member's term.

ARGUMENT

I. APPELLANT IS NOT IMMUNE FROM SUIT UNDER THE CAA

The Speech or Debate Clause of the Constitution is a bulwark of legislative independence, providing both immunity from suit challenging legislative acts and an evidentiary privilege concerning them. Members conduct much official business, however, that does not involve legislative acts, and the Speech or Debate Clause does not protect such activity. *See, e.g., Gravel v. United States*, 408 U.S. 606, 625 (1972) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."); *United States v. Brewster*, 408 U.S. 501, 512 (1972) ("A Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts").

When the Court has extended the privilege beyond the literal words of the Constitution—speech or debate—it has been careful to protect only conduct which is legislative at its core, such as voting or committee proceedings. *See, e.g., Gravel v. United States*, 408 U.S. 606, 625 (1972). The act in question in this case, a Senator's firing of an aide, is not legislative, and it is not entitled to protection from the Speech or Debate Clause.

A. The Court's Speech or Debate Jurisprudence Does Not Confer Immunity on Appellant

The Court has directly addressed the Speech or Debate Clause in ten cases involving Members of Congress:

Kilbourn v. Thompson, 103 U.S. 168 (1880)
United States v. Johnson, 383 U.S. 169 (1966)
Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam)

Powell v. McCormack, 395 U.S. 486 (1969)
United States v. Brewster, 408 U.S. 501 (1972)
Gravel v. United States, 408 U.S. 606 (1972)
Doe v. McMillan, 412 U.S. 306 (1973)
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)
United States v. Helstoski, 442 U.S. 477 (1979)
Hutchinson v. Proxmire, 443 U.S. 111 (1979)

The Clause has also been discussed in cases holding that legislators in state, regional or local governments can assert an equivalent common law privilege. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (regional legislators); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (local legislators). Together, these congressional and state cases address the types of acts to which the Speech or Debate privilege applies, its effect, and the identity of those protected by the privilege (in addition to the legislators themselves). As becomes evident, none of this authority supports the idea that personnel decisions, such as who to hire, promote or fire, are routine legislative acts entitled to immunity.

The Court's first Speech or Debate case, *Kilbourn v. Thompson*, held that Members of the House could not be sued for issuing an invalid order finding an individual in contempt, because issuance of the order came within the ambit of the Clause, *i.e.*, "to things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. The Court continued to apply variations of this formulation in later cases, *e.g.*, *United States v. Johnson*, 383 U.S. at 172 ("the due functioning of the legislative process"); *Dombrowski v. Eastland*, 387 U.S. at 85 ("the sphere of legitimate legislative activity").

In *Brewster*, however, the Court cautioned that "in no case has this Court ever treated the Clause as protecting all

conduct *relating* to the legislative process. * * * [T]he Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process – the *due* functioning of the process." 408 U.S. at 515-16 (emphasis original) (footnote omitted). In similar fashion, the Court in *Gravel* said that its earlier decisions in *Kilbourn*, *Dombrowski* and *Powell* "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." 408 U.S. at 620.

The focus on whether conduct was truly a part of the legislative process, as opposed to merely related or preparatory to legislative activity, guided the Court in *Gravel:*

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625.

The Court's most recent Speech or Debate case quoted this passage from *Gravel* but emphasized certain portions, specifically—"Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation. . . ." *Proxmire*, 443 U.S. at 126 (emphasis original).

The closest the Court has come to addressing an action related to employment under the legislative privilege occurred in *Bogan v. Scott-Harris.* In *Bogan*, the plaintiff

challenged a city council decision adopting an ordinance that eliminated her one-person department, claiming racial animus and retaliation. After holding that local legislators were entitled to the same privilege that *Tenney* and *Lake Country Estates* gave to their peers at the state and regional level, 523 U.S. at 54, the Court then decided that passage of the ordinance in question was a legislative act for which the legislators were immune from suit. In particular, the "acts of voting for an ordinance were, in form, quintessentially legislative." *Id.* at 55. And in substance, the ordinance "bore all the hallmarks of traditional legislation." *Id.* Among other things, it "involved the termination of a position," based on policy and budgetary concerns. The Court specifically distinguished the legislation in *Bogan* from typical employment decisions such as the "hiring or firing of a particular employee" (which are at issue in most CAA cases), because elimination of a position "may have prospective implications that reach well beyond the particular occupant of the office." *Id.* at 56.

Bogan presents the rare circumstance in which an action affecting employment was legislative in nature. In Brad Hanson's case, of course, no vote was taken when he was dismissed; nor was his position eliminated. He was just fired.

B. Managing an Employee Is Not a Legislative Act

Appellant contends that a Member's management of a staffer, at least one with legislative duties—which it says included Hanson[3]—is a legislative act. It is not.

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[3] The parties disagree about how much of Hanson's time was devoted to legislative duties, *see* J.S. App. 39a-40a, but in any event the Office's asserted reason for Hanson's firing—his ostensibly poor performance managing the Health Care Help Line was not a legislative task. *See* Section I.F below.

The activities other than pure speech or debate held protected by the Clause all fit easily within the Court's formulation in *Gravel*, 408 U.S. at 625: they were "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings"—*i.e.*, voting for an invalid contempt order, *Kilbourn*, 103 U.S. at 205; voting to issue subpoenas, *Dombrowski*, 387 U.S. at 84; voting to exclude a Member, *Powell*, 395 U.S. at 550; participating in a committee meeting, regardless of the kind of material read aloud or placed in the public record, *Gravel*, 408 U.S. at 615; introducing allegedly defamatory material at committee hearings and voting for publication of a report containing the material, *Doe v. McMillan*, 412 U.S. at 312; and participating in a legislative investigation, *Tenney*, 341 U.S. at 377, including voting to authorize committee investigations and to issue supporting subpoenas, *Eastland*, 421 U.S. at 505.

These are not close calls. Many of these protected activities involve voting, perhaps the archetypal form of "deliberative and communicative" expression used in "committee and House proceedings," so that voting is "quintessentially legislative" in character. *Bogan v. Scott-Harris*, 523 U.S. at 55. The other protected activities all involve some form of participation in committee hearings and are plainly "an integral part of the deliberative and communicative processes by which Members participate in committee . . . proceedings." *Gravel*, 408 U.S. at 625, *quoted with emphasis in Proxmire*, 443 U.S. at 126.

Routine personnel decisions, in contrast, are not *any* part of the "deliberative and communicative processes" used to participate "in committee or House proceedings," let alone an "integral" part. Appellant contends that personnel actions are related to the legislative process because a Member needs competent staffers to be able to participate. In *Brewster*, though, the Court said that "in no case has this Court ever

treated the Clause as protecting all conduct *relating* to the legislative process." 408 U.S. at 515 (emphasis original) (footnote omitted). Instead, "the Speech or Debate Clause has been limited to an act which was *clearly a part of the legislative process*—the *due* functioning of the process." *Id.* at 515-16 (first emphasis added; second emphasis ("due") original) (footnote omitted).

A personnel decision is not "clearly a part of the legislative process," and appellant's attempt to make it fit requires too much elastic:

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process.

Brewster, 408 U.S. at 516.

The most that appellant can claim of typical employment decisions is that they are taken in preparation for a Member's legislative activity; that is, by deciding who to hire, promote or fire, the Member or his designee exerts control over who will perform work on a legislative agenda. But as this Court cautioned in *Gravel*, the Clause does not reach conduct that is merely preparatory to, but not itself a part of, the legislative process:

> While the Speech or Debate Clause recognizes speech, voting and other legislative acts, as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law *in preparing for* or implementing legislative acts.

408 U.S. at 626 (emphasis added).

Commentators have focused on the important distinction between preparatory conduct and actual legislating in concluding that the privilege does not apply to the former: "In establishing terms and conditions of employment for top aides, a member decides what is necessary to enable her to participate as an effective legislator, but that decision is not itself a form of legislative participation." James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees,* 36 Harvard J. on Legis. 1, 43 (1999).

Professor Nelson Lund, who testified in 1994 before the Joint Committee on the Organization of Congress, agreed:

> The law can be summarized in very simple terms: It provides absolute immunity for purely legislative activities but not other forms of official conduct. The issue I have been asked to address reduces to just one question: Are employment-related decisions such as hiring and firing congressional aides, setting their pay scales, and bargaining with employee unions part of the legislative process, or are they official but non-legislative decisions? It seems to me that the answer is perfectly clear. Employment decisions can be very important in facilitating the legislative process, but they are not part of it.

Summary of Hearings on Application of Laws, Joint Committee on the Organization of Congress, Application of Laws and Administration of the Hill Hearing (June 8, 1993); *see* www.rules.house.gov/archives/jcoc2aj.

The Court has not directly confronted the application of the Speech or Debate Clause to employment decisions, but in *Forrester v. White*, 484 U.S. 219 (1988), it rejected the argument made by appellant here. In *Forrester*, a probation officer brought an action under 42 U.S.C. § 1983 against the state court judge who had fired her. Judge White argued, as appellant does here, that he relied on his staff to perform

important delegated judicial functions, so his supervision of those functions should have been deemed a judicial act subject to judicial privilege. The Seventh Circuit accepted this reasoning and held the judge immune from suit, with Judge Posner dissenting. The majority said:

> It is, for example, of fundamental importance that the modern judge differs from his predecessor in that he must rely more on his staff for advice on substantive decisions, and that certain research functions formerly performed by the judge are now accomplished in part by his staff. A judge's institutional personality, therefore, extends beyond his person.

Forrester v. White, 792 F.2d 647, 654 (7th Cir. 1986).

This Court unanimously reversed, finding that Judge White's conduct as a supervisor was administrative, not judicial. In so holding, the Court adverted to the Speech or Debate Clause:

> This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause. . . . Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require.

484 U.S. at 224.

The Court observed that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts" warranting immunity. *Id.* at 228. "[T]he nature of the function performed, not the identity of the actor who performed it . . . inform[s] [the Court's] immunity analysis," *id.* at 229, so the judge was not entitled to immunity from suit:

> Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those

> acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.

Id.

Senator Dayton's conduct here—firing an employee—was also administrative, even though "supervising [legislative] employees and overseeing the efficient operation of a [congressional office] . . . may [be] quite important in providing the necessary conditions of a sound [legislative] system." It is simply not legislative activity entitled to immunity.

Appellant objects that *Forrester* involved a common law privilege, not one written into the Constitution. But the Speech or Debate Clause is itself rooted in the English common law. *See Tenney*, 341 U.S. at 372 ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."). It is for this reason that the Court "generally ha[s] equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980).[4]

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[4] Appellant says that judicial immunity is less protective in some situations than legislative immunity under the Speech or Debate Clause, citing *Dennis v. Sparks*, 449 U.S. 24 (1980), and *United States v. Giliock*, 445 U.S. 360 (1980). Even assuming this is true, the Office has not shown that any differences matter in terms of demonstrating why the Court's approach to privilege in *Forrester* should not be employed in Speech or Debate cases. In any event, the Court in *Dennis* accorded immunity to an allegedly corrupt judge and noted that "in general, the scope of state legislative immunity for purposes of § 1983 has been patterned after immunity under the Speech or Debate Clause." 449 U.S. at

C. The D.C. Circuit Correctly Overruled *Browning*

Appellant's argument relies entirely on the approach to legislative immunity adopted in *Browning*, which the unanimous *en banc* court below "reject[ed]" and "repudiate[d]." J.S. App. 27a (Randolph , J.); *id.* at 45a (Brown, J.). In *Browning*, the D.C. Circuit had focused on the identity of the employee—in particular, whether the duties associated with her position were legislative in nature—and held that, "[w]here the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee," 789 F.2d at 928, so "the standard for determining Speech or Debate Clause immunity is best expressed as whether the employee's duties were directly related to the due functioning of the legislative process," *id.* at 929 (emphasis removed).

In the present case, the court of appeals correctly saw *Browning* as irreconcilable with this Court's Speech or Debate jurisprudence, as well as the Court's decisions in related areas, particularly *Forrester*, where the Court said that "the nature of the function performed, not the identity of the actor who performed it . . . inform[s] [its] immunity analysis." 484 U.S. at 229. The functional approach to immunity taken in *Forrester*—grounding immunities in "the nature of the function performed" by the official making the personnel decision—was quite clearly in tension with *Browning*'s emphasis on the duties of the aggrieved employee. The Court's treatment of the Speech or Debate Clause has similarly examined the functions performed by the Member asserting privilege. *See, e.g., Johnson*, 383 U.S. at 172, 177 (distin-

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30, *citing Supreme Court of Virginia*, 446 U.S. at 732-34. And *Gillock*, in which a state legislator was charged with violating federal criminal law, was simply a Supremacy Clause case: "in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." 445 U.S. at 370.

guishing between lobbying the Department of Justice, which was not protected by the Clause, and a floor speech, which was); *Brewster*, 408 U.S. at 526-28 (distinguishing between protected voting and unprotected promises to vote a certain way); *Gravel*, 408 U.S. at 622-27 (convening a hearing about the Pentagon Papers and placing them into the public record was privileged, but arranging for private publication was not).

Given the palpable inconsistency between this Court's immunity decisions and *Browning*, all eight D.C. Circuit judges sitting *en banc* agreed that the case should be overruled. *See* J.S. App. 17a (Randolph, J., opinion for the Court in part) (*Browning* "is, at a minimum, over inclusive"); *id.* at 28a (Rogers, J., concurring in part and in the judgment) ("the employee-duties test of *Browning* . . . is overbroad and must be rejected"); *id.* at 45a (Brown, J., concurring in the judgment) ("by focusing on the duties of the complaining employee . . . *Browning* established a much broader immunity than necessary to protect legislative independence, and nothing in the Speech or Debate Clause or the Supreme Court's precedents compelled this broad immunity").

Judge Randolph noted that the Tenth Circuit in *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S.Ct. 396 (2005)—the only other court of appeals to address Speech or Debate immunity in the context of the CAA—"considered [*Browning*] inconsistent with the Supreme Court's Speech or Debate Clause jurisprudence." J.S. App. 11a. Recently, a third court of appeals has joined D.C. and the Tenth Circuit in rejecting *Browning*. *Fowler-Nash v. The Democratic Caucus of the Pennsylvania House of Representatives*, 469 F.3d 328, 335-37 (3d Cir. 2006).[5] There is no division in the circuits on this issue.

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[5] The only other court to adopt an analysis similar to *Browning*'s, although not in the context of the Speech or Debate Clause, was the First

Appellant is engaged in a transparent attempt to resuscitate *Browning*. The Question Presented—whether the Speech or Debate Clause "bar[s] federal court jurisdiction of an action brought under the [CAA] by a congressional employee whose job duties are part of the due functioning of the legislative process"—is precisely the approach that the D.C. Circuit took in *Browning*, as Judge Randolph explained in detail. *See* J.S. App. 17a. *Browning*'s perspective is inconsistent with this Court's precedent on immunity, as three circuits have recognized.[6]

D. Congress Crafted the CAA Cognizant of Speech or Debate Concerns

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court fashioned a *Bivens*[7] remedy for a congressional employee

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Circuit in *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984), which preceded *Forrester* by four years. The court in *Fowler-Nash* explained that "[t]he Court of Appeals for the First Circuit has repeatedly undermined or ignored *Agromayer*." 469 F.3d at 334.

[6] Judge Randolph, J.S. App. 19a, properly rejected any analogy between Speech or Debate immunity and the immunity of the President recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), on which appellant also relies. In *Fitzgerald*, the Court concluded that the President, who "occupies a unique position in the constitutional scheme," *id.* at 749, "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* The President's immunity extends to *all* his official functions, including personnel matters at the Pentagon: "In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 755. Unlike the President, however, Members of Congress enjoy absolute immunity only for actions within a subset of their official functions—legislative acts. And even here, "[i]t is not enough that a Member's conduct is within the outer perimeter of the legislative process." J.S. App. 19a.

[7] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

claiming sex discrimination but did not address the Speech or Debate privilege. Chief Justice Burger dissented, saying "Congress could, of course, make *Bivens*-type remedies available to its staff employees . . . but it has not done so. * * * until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed." *Id.* at 249, 250. Congress has now acted.

1. *Background to Enactment*

Passage of the Congressional Accountability Act in 1995 overturned a decades-old congressional practice. Before the CAA, from the enactment of the Fair Labor Standards Act in 1938 through passage of the Family and Medical Leave Act in 1993, Congress systematically exempted the legislative branch from workplace obligations it imposed on the private sector, state and local governments, and the executive. During the debate on the CAA, Senator Smith recalled that "[f]or decades, Congress has routinely—routinely—exempted itself from a wide range of laws governing such matters as civil rights, employment discrimination, sexual harassment, workplace safety, and on and on and on. In a very real sense, then, Congress indeed has placed itself above the law." 141 Cong. Rec. S455.

Voters grew increasingly disenchanted, however,[8] and Congress reversed course with the Accountability Act, which applied eleven workplace statutes to all offices in the legislative branch, 2 U.S.C. § 1302(a).[9] The CAA's passage

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[8] Senator Grassley said that "nothing makes Americans madder than knowing that they have to live by laws that their Representatives in Congress do not." 141 Cong. Rec. S441.

[9] The laws applied are (1) the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, (3) the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, (4) the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, (5) the

culminated a lengthy process extending over three Congresses. Before the 102nd Congress, both Houses provided protection to legislative branch employees only through internal rules, which Members such as Senator Simpson acknowledged were ineffective: "We set rules which allow us to go about our merry way with little fear that if we do happen to cross the line from time to time, it doesn't really matter because there is no practical enforcement mechanism." 141 Cong. Rec. S686.

The tide began to turn in the 102nd Congress during the debate on the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991), when Senators Grassley and Mitchell proposed an amendment that among other things gave employees of the Senate—but not the House of Representatives—some protection from the types of discrimination prohibited by Title VII, the ADEA and the ADA. The amendment, adopted as Title III of the 1991 Act, became the Government Employee Rights Act (GERA), *formerly* 2 U.S.C. §§ 1201 *et seq.* It provided for administrative hearings and record review of administrative decisions in the Federal Circuit—but not a private right of action in district court.[10]

GERA was not enough—and not just because the House was exempt. Both GERA and the internal House rules relied on administrative processes that were widely deemed

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Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2611 *et seq.*, (6) the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 *et seq.*, (7) Chapter 71 of Title 5 (relating to Federal service labor-management relations), 5 U.S.C. §§ 7101 *et seq.*, (8) the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001 *et seq.*, (9) the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.*, (10) the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and (11) Chapter 43 of Title 38 (relating to veterans' employment and reemployment), 38 U.S.C. §§ 4301 *et seq.*

[10] GERA was supplanted in 1995 by the broader CAA. *See* 2 U.S.C. § 1435(a).

inadequate and in any event out of step with what Congress had provided for the rest of the country. In the 103rd Congress, the House of Representatives passed an accountability bill, H.R. 4822, by a vote of 427-4, in August 1994. [11] The Senate Committee on Governmental Affairs conducted hearings and issued a favorable report on a similar bill in October 1994, but the Senate adjourned for the campaign before taking it up.

The Republican Party then made the enactment of accountability legislation a campaign issue in the November 1994 mid-term election—part of the "Contract with America"[12]—and the Congressional Accountability Act was the first statute passed by the new 104th Congress following the party's sweeping victory. The House acted first, passing H.R. 1 on January 4, 1995, immediately after the Republicans organized the chamber, by a vote of 429-0.[13] On January 11, the Senate passed S. 2, a slightly different version of the accountability legislation, 98-1, with only Senator Byrd dissenting.[14] On January 17, the House avoided a conference and itself passed S. 2, 390-0.[15] The President signed the bill into law on January 22, 1995.[16]

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[11] 140 Cong. Rec. H7370.

[12] Among other things, the Contract promised to "require all laws that apply to the rest of the country also apply equally to the Congress." *See* www.nationalcenter.org/ContractwithAmerica.

[13] 141 Cong. Rec. H104.

[14] 141 Cong. Rec. S767.

[15] 141 Cong. Rec. H286. The House felt secure in dispensing with a conference because H.R. 1 and S. 2 were substantively the same. Representative Thomas reported to the House that "[t]he only substantive difference in S. 2 from H.R. 1 . . . is the addition of the Veterans Reemployment Act to the list of bills under which Congress will now operate." 141 Cong. Rec. H269.

[16] 1995 WL 14935.

Congress could act quickly because the 1995 Act borrowed liberally from the approach considered in 1994. No new hearings or reports were deemed necessary, and the pertinent reports are those issued a few months earlier in the 103rd Congress—S.Rep. 103-397 (Oct. 3, 1994), H.Rep. 103-650 (I) (Aug. 2, 1994), and H.Rep. 103-650 (II) (Aug. 2, 1994).[17] Indeed, S. 2, the bill that passed, was "almost identical" to the bill the Senate Committee on Governmental Affairs had reported favorably in the 103rd Congress. S765 (Mr. Rockefeller).

2. *The Act's Salient Reform: Judicial Enforcement*

Judicial enforcement—affording congressional employees the same access to the judiciary enjoyed by their private sector counterparts—was the CAA's single most significant reform. Senator Snowe observed that under the House's internal administrative scheme, "just 16 staffers in 4 years had enough confidence in the office to file complaints [and] only four cases went to the end of the grievance process." 141 Cong. Rec. S665. She said that "the legislative branch has been entirely incapable of policing itself," so "[s]trong enforcement measures are absolutely necessary if we are going to make Congress abide by the same laws that apply to the private sector." *Id.*

Members of Congress agreed that "strong enforcement" meant judicial enforcement. Thus, S.Rep. 103-397 (Oct. 3, 1994), which just three months earlier had reported a bill "almost identical" to S. 2, said that the "most significant" addition to the GERA regime was "the option of initiating an action in federal district court." *Id.* at 23. And Representative Fawell explained that "members are currently exempt from the *most important aspect* of many private sector laws, the right of employees to sue the employer in

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[17] *See* 141 Cong. Rec. S475 (Mr. Roth); *id.* at H103 (Mr. Fawell).

trial court for damages. In this day and age, these employee rights are what put the 'teeth' into many of our private sector labor laws." 141 Cong. Rec. H103 (emphasis added).

3. *The Statutory Text*

Appellant argues that the statute must be interpreted in a manner which would deprive any legislative branch employee with duties related to the legislative process the right to pursue claimed violations of the CAA in court. This argument finds no support in the statutory text.

The definitions in 2 U.S.C. § 1301 show the statute's breadth; it covers literally every employee in the legislative branch. Thus "[t]he term 'covered employee' means any employee" of the House of Representatives and the Senate (as well as employees of seven other legislative branch offices, such as the Capitol Police). *Id.* at § 1301(3). Further, "employee of the House of Representatives" and "employee of the Senate" include workers paid through the Clerk of the House or the Secretary of the Senate, respectively, the entities that customarily disburse pay to the personal staffs of the Members, as well as to committee staffers. 2 U.S.C. § 1301(7), (8).

A civil action, in turn, is available to any "covered employee who has completed counseling . . . and mediation." 2 U.S.C. § 1408(a). The defendant in any civil action is the "employing office" alleged to have committed the violation or in which it occurred. *Id.* at 1408(b). And the Act defines "employing office" as, among other things, the personal office of a Member of Congress or a committee of either House (or a joint committee). 2 U.S.C. § 1301(9)(A), (B).[18]

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[18] The Act's specification of a defendant in civil actions involving the legislative branch is quite similar to the approach used when Title VII was applied to the executive branch by the Equal Employment Opportunity Act of 1972, 86 Stat. 103. New section 717(c), 42 U.S.C. § 2000e-16(c),

Finally, section 415, 2 U.S.C. § 1415, provides for payment of all CAA awards and settlements out of a special fund created specifically for this purpose. There are no temporal limits on the use of this fund—specifically, no prohibition on payments of an award or settlement after the expiration of a Member's term of office. The only limit of any kind is a bar to use of the fund to remedy matters related to OSHA or to accommodation and accessibility standards. 2 U.S.C. § 1415(c).[19]

The statutory text is unambiguous. Congress intended that all its employees would have the same rights under the CAA, including the right to go to court.

4. *Congress Carefully Considered Separation of Powers Issues, Including Speech or Debate*

Appellant argues about the Speech or Debate Clause and more broadly about separation of powers generally. But Congress carefully considered both principles in the CAA and decided to provide all legislative branch employees the right to enforce CAA claims in court. Congress is of course free to repeal the CAA if it ultimately determines that the Act presents a threat to legislative independence, but there is no indication that it does; indeed, the Senate's decision to file an *amicus* brief supporting appellee shows that Congress remains comfortable with the balance the CAA has struck.

"The Speech or Debate Clause reinforces the separation of powers and protects legislative independence." J.S. App. 12a, *citing Eastland*, 421 U.S. at 502; *Brewster*, 408 U.S. at

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provided that the defendant in any civil action must be the head of the appropriate department, agency or unit, while the CAA specifies the defendant in a lawsuit must be the employing office.

[19] Section 415 also makes clear that the fund may not be used to pay awards or settlements for the General Accounting Office, the Government Printing Office or the Library of Congress. 2 U.S.C. § 1415(a).

507; *Johnson*, 383 U.S. at 1278; *Gravel*, 408 U.S. at 616; *Powell*, 395 U.S. at 503; *Tenney*, 341 U.S. at 373. More particularly, "the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Johnson*, 383 U.S. at 181.

The Clause itself does not mention either the executive or judicial branches. It is evident, though, that the focus in terms of separation of powers is on the long struggle between an at times "intimidating" executive and the legislature. Indeed, the Court has sometimes spoken solely of the executive in explaining why the Speech or Debate privilege is essential to maintaining the separation of powers, *e.g.*, *Gravel*, 408 U.S. at 616 ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.").

Maintenance of the separation of powers is a perennial concern of Congress, and this was especially evident when it considered what became the CAA. But Congress worried about usurpations by the executive—not the judiciary. So Congress literally wrote the executive out of the Act in 2 U.S.C. § 1361(f)(3) (prohibiting any construction of the CAA which would "authorize enforcement by the executive branch"), while at the same time giving the judiciary a crucial enforcement role.

This was a considered decision. The Committee on House Administration, in favorably reporting HR 4822—one of the Act's forerunners—in August 1994, said that the bill's authors were guided by "three basic principles," one of which was, "[t]he separation of powers embodied in the Constitution must be respected." Specifically, "[t]he Legislative Branch must be free from Executive Branch intimidation real or perceived in the execution of its Constitutional role as a co-

equal branch of the federal government." H.Rep. 103-650 (II) at 11.[20]

At about the same time, the Senate Governmental Affairs Committee adopted the view that "the separation-of-powers concerns that make executive-branch enforcement unacceptable are not applicable to district court actions." S.Rep. 103-397 at 6. Senator Grassley, the principal Republican sponsor of the CAA and the Republican floor manager when it passed in 1995, explained the congressional reasoning:

> Allowing access to district courts makes the available remedies more like those available to both private-sector and executive-branch employees. Courts and judges do not have the complex interactions with Congress that executive agencies have, so the risk of intimidation would not arise.

141 Cong. Rec. S444.

Against this background, Congress expressly rejected the notion that the Speech or Debate Clause limited its power to make a judicial forum available to its employees. Senator Lieberman, the CAA's principal Democratic sponsor in the Senate, said that one argument against the legislation "goes to the heart of the construct of the bill that Senator Grassley, I, and Senator Glenn, in his capacity as chair last year of the Government Affairs Committee, have brought out. The argument is that this bill . . . represents a violation or a potential violation of the separation of powers doctrine and the speech or debate clause." 141 Cong. Rec. S700. He said that the sponsors of the CAA disagreed: "our conclusion was that [the speech and debate clause] should not and cannot provide Members of Congress with immunity for illegal employment actions, for illegal actions in our capacity as employers of those who work for and with us here on Capitol Hill." *Id.* at S701.

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[20] *See* text accompanying n.17 above.

Senator Grassley struck a similar note, saying there had been "reference to the *Browning* case, decided by the D.C. circuit in 1986." 141 Cong. Rec. S639. Then he discussed the effect of *Forrester* on *Browning* and concluded, "So you can see that in *Forrester*, the Supreme Court is telling us that the *Browning* decision is not as compelling as it was for the 2 years before the *Forrester* case came before the Supreme Court." *Id.* at S639-40.

In the House, Representative Goodling, a veteran proponent of accountability legislation, placed into the record a memorandum from the Congressional Research Service that Mr. Goodling said "concluded that legislation allowing congressional employees to bring lawsuits in court would likely be upheld and does not pose a serious constitutional question." 141 Cong. Rec. H264.

This Court has taken a pragmatic approach to Speech or Debate issues. "Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that *realistically* threatens to control his conduct as a legislator." *Gravel*, 408 U.S. 618 (emphasis added).

Congress eliminated any role for the executive in enforcing the CAA. Having done so, Congress determined that giving important responsibility to the judiciary would not "realistically threaten[] to control [Members'] conduct as . . . legislator[s]."

The congressional view of the constitutionality of legislation affecting its own Members, while certainly not decisive, is entitled to deference: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974).

With the CAA in particular, Congress acted after "weigh[ing] competing constitutional interests in an area in which it enjoys particular expertise," *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003), so again some measure of deference is due. Finally, the assessment that executive officials might be in a position to intimidate Members, but that judges would not, is a judgment that only Congress is qualified to make. It should be respected.

E. Both Approaches to Immunity in the Opinions Below Are Valid

The sole issue in this case is whether Speech or Debate immunity divests the district court of jurisdiction to consider Brad Hanson's complaint. Judges Randolph and Brown agreed for a unanimous court that "the Speech or Debate Clause does not bar jurisdiction in these cases" (*i.e., Hanson* and *Fields*). J.S. App. 27a (Randolph, J.); *see id.* at 57a (Brown, J.).

Judges Randolph and Brown disagreed, however, on the approach to be taken in resolving Speech or Debate issues under the CAA in the absence of *Browning*. Judge Randolph assumed that the defendant Offices could invoke the Speech or Debate privilege for all purposes, including the assertion of absolute immunity from suit, but "because neither of the cases before us rests on legislative acts, we have no basis for dismissing them." J.S. App. 31a (Tatel, J., concurring). Judge Randolph noted, however, that "[w]hen the Clause does not preclude suit altogether, it still 'protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.'" *Id.* at 21a-22a, *quoting Brewster*, 408 U.S. at 508.

Judge Brown believed that the defendant Offices "are not members of Congress entitled to invoke the Speech or Debate Clause, nor are they alter egos of members." S.J. App. 57a. For this reason, "the Speech or Debate Clause does not pro-

vide a basis for dismissing these actions; rather, it operates as an evidentiary protection for members of Congress and their aides who might be asked to provide evidence" in the cases. *Id.*

Both approaches to Speech or Debate immunity have merit, but appellee prevails if either one is upheld.

1. *This Case Does Not Involve a Legislative Act*

Judge Randolph examined the pleadings—specifically, Hanson's complaint—as the Court had in *Tenney*, 341 U.S. at 376, *Brewster*, 408 U.S. at 525, and *Doe v. McMillan*, 412 U.S. at 312, and determined that he had not "sought to predicate liability on protected conduct." S.J. App. 20a. That is, Hanson simply alleged that Senator Dayton discriminated against him because of his heart condition and he was also improperly denied overtime pay. *Id.* "In neither [*Hanson* nor *Fields*] is it 'necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation' of the Accountability Act." *Id., quoting Brewster*, 408 U.S. at 526. In short, Hanson's complaint does not challenge legislative acts, so "the Speech or Debate Clause does not bar jurisdiction." S.J. App. 27a.

2. *The Speech or Debate Privilege May Not Be Invoked by or on Behalf of a Member's Office*

Judge Brown, joined by Judges Sentelle and Griffith, viewed a Member's "employing office" as an administrative device to implement certain functions of the CAA, not as an "alter ego" of the Member entitled to assert legislative immunity. The language and structure of the Act, along with this Court's authority on "alter ego" status under the Speech or Debate privilege, support that conclusion.

Gravel held that a Member's aide was protected by the Speech or Debate privilege to the extent she was serving as

the Member's "alter ego" on legislative matters; *i.e.*, the Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618. The CAA specifies that the "employing office" is to serve as the defendant in a civil action, 2 U.S.C. § 1408(b), and for congressional employees working for a Member, the employing office is the Member's office, *id.* at § 1301(9)(A). Appellant—the defendant Office of Senator Dayton—argues that it, like a Member's legislative aide, is the Senator's alter ego on legislative matters and hence is protected by the Speech or Debate privilege.

Judge Randolph accepted this premise, at least for the sake of argument. Judge Brown did not: the employing office "is not an alter ego of the member." J.S. App. at 46a. This means that there is "no reason to conclude that the employing office in an action brought pursuant to the Act is entitled to invoke the Speech or Debate Clause." *Id.* at 52a. And "[b]ecause appellants are not members of Congress, or alter egos of members, and therefore have no Speech or Debate Clause protection, the jurisdictional bar is not applicable." *Id.* at 53a (footnote omitted).

Judge Brown's argument is elegant and has more support than is mustered in her opinion. There are a number of factors that together show that a Member's office is a shell—a "legal fiction" in former Congressman Hyde's words[21]—and that a CAA suit is against Congress, just as a Title VII suit involving an executive branch agency is against the United

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[21] Former Representative Henry Hyde, who submitted an *amicus* brief below, characterized the "employing office"—or more precisely, the CAA's according this status to the personal office of a Member—as a "legal fiction," saying "[t]here is nowhere else in the law a legal entity known as a Member's 'office.'" *Amicus* Brief of Congressman Henry Hyde (Hyde *Amicus* Brief) at 10, No. 04-5315 (D.C. Cir.) (July 18, 2005).

States, even though the named defendant is the head of the agency. *See* 42 U.S.C. § 2000e-16(c).

First, the Member's office is defended by institutional counsel—in the Senate the Office of Senate Chief Counsel for Employment—in any judicial action brought under the CAA. Second, the Act defines "covered employee" as (among other things) "any employee of . . . the House of Representatives [or] . . . the Senate." 2 U.S.C. § 1301(3). This strongly suggests that—for purposes of the CAA—staffers on Capitol Hill work for either the House or the Senate, rather than for a particular employing office. This inference is buttressed by 2 U.S.C. § 1301(7), (8), which defines "employee of the House of Representatives" and "employee of the Senate" as workers paid centrally by the Clerk of the House or the Secretary of the Senate, respectively.

Third, and even more significant, 2 U.S.C. § 1311, which among other things specifies how Title VII is to be applied to the legislative branch, says that damages may be awarded as permitted by 42 U.S.C. § 1981a(b)(3)(D), "irrespective of the size of the employing office." 2 U.S.C. § 1311(b)(1)(B). Some statutory close order drill is required here. Damages are available under Title VII because of 42 U.S.C. § 1981a, which was added by the Civil Rights Act of 1991. Damage awards are capped, however, depending on the size of the employer, and the highest possible award is $300,000 against employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). But CAA plaintiffs are eligible for $300,000 "irrespective of the size of the employing office."

In brief, the CAA treats all employees as if they worked for an employer with more than 500 employees. But that is true only if they really work for Congress, because most employing offices are considerably smaller. Judge Brown compared the employing office to a department in a large corporation, J.S. App. 47a, and that analogy is apt.

Fourth, under 2 U.S.C. § 1414, settlements do not become effective until approved by the Executive Director of the Office of Compliance. This is again reminiscent of the corporate setting in which EEO settlements negotiated by a department do not become final until approved by corporate headquarters.

Fifth, 2 U.S.C. § 1415 provides for payment of all CAA awards and settlements out of a special fund created specifically for this purpose. In this regard, the 1994 Senate report was careful to point out that "[n]othing in this Act authorizes [any officer or entity] . . . to direct that amounts paid for settlements or awards be paid from official accounts of the employing office." S.Rep. 103-397 at 29.

Sixth and finally, the bill reported in October 1994 by the Senate Committee on Governmental Affairs—which was "almost identical" to S. 2, which passed and became the CAA three months later—specified that the defendant in a civil action brought by a Senate employee would be the Senate, or the House if brought by a House employee, or the head of the employing entity if the civil action were brought by an employee elsewhere in the legislative branch. S.Rep. 103-397 at 27. It is simpler and promotes greater accountability to have the named Member's employing office be the defendant, as was done in S. 2 in January 1995. There is nothing in the record—zero—to indicate that the change in nomenclature signified a substantive difference.

There are many indicators, and they all point in the same direction. A lawsuit under the CAA is against the Congress. The employing office is a shell, a stand-in for Congress. It is certainly not the alter ego of a Member for any purpose, including assisting with legislation. And since only Members and their alter egos on legislation are protected by the Speech or Debate privilege, it may not be invoked for employing offices.

This approach would permit suits under the CAA to proceed, even if a personnel decision could be viewed as a legislative act. The Court has long recognized that even though Members of Congress cannot be sued for their legislative acts, it may still be possible for a plaintiff to secure relief for an invalid legislative act if it is implemented by a person who is not protected by the Speech or Debate Clause. So, even assuming Hanson's firing was a legislative act—and it was not—the appellant Office at most implemented the decision by processing the necessary paperwork and hence is subject to suit. The Court's precedent supports this approach.

In *Kilbourn v. Thompson*, the plaintiff sued the Sergeant-at-Arms of the House of Representatives and several House Members for false imprisonment, after being arrested and jailed by the Sergeant-at-Arms pursuant to a House resolution finding the plaintiff in contempt. The Court devoted much of its opinion deciding that the House lacked authority to issue the contempt order, but then held that the Members themselves were immune from suit under the Speech or Debate Clause. 103 U.S. at 200-05. But the Court allowed the suit to proceed against the Sergeant-at-Arms. *Id.* at 205.

Kilbourn has a modern counterpart in *Powell*, which contested the validity of a House resolution barring the seating of Representative Adam Clayton Powell. The Court dismissed the suit against the Members themselves, because there was no question that passing the resolution was a legislative act protected by the Speech or Debate Clause. As in *Kilbourn*, however, the Court held the resolution invalid and allowed the suit to proceed against those responsible for its implementation—the Clerk of the House, the Sergeant-at-Arms and the Doorkeeper. 395 U.S. at 506. *See also Dombrowski*, 387 U.S. at 84 (committee counsel was not immune from suit concerning an allegedly unlawful conspiracy with state officials to secure evidence by improper means).

In *Gravel*, the Court considered whether the Speech or Debate Clause protected a Member's aides and held that the Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618. The Court distinguished *Kilbourn*, *Powell* and *Dombrowski*, saying that these cases did not hold that "immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection," *i.e.*, was not a legislative act. *Id.* at 620. In particular,

> In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order . . . in [*Dombrowski v.*] *Eastland*, the committee counsel was gathering information for a hearing; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions. . . .
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> * * *
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> None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in *Eastland*, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen.

Id. at 620-21.

In short, the implementation of a legislative act—which is the most the Office did here—is not legislative in nature and is not protected by the Speech or Debate privilege. Judge

Brown's analysis has merit on a number of fronts, and if she is right, no further examination is needed. The Court need not reach Judge Brown's theory, however, because Hanson's firing was not a legislative act.

F. It Is Premature to Address the Precise Contours of the Evidentiary Privilege

The sole issue presented by this appeal is whether appellant is immune from suit. Indeed, the only reason the court below had jurisdiction to hear an appeal from a non-final order was because of the immunity gloss on the collateral order doctrine: "The denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

Judges Randolph and Brown agreed that appellant is not immune from suit and that the district court properly asserted jurisdiction. They also agreed that the Speech or Debate Clause would likely continue to play a role in the litigation because of its evidentiary privilege. Even in a situation with no immunity, it is still improper to ask a Member about legislative acts or their motivation. *Johnson*, 383 U.S. at 177; *Helstoski*, 442 U.S. at 487. In short, a CAA plaintiff may not seek to prove his case by quizzing a Member about legislative acts.

Congress itself reaffirmed this principle in the CAA by including section [illegible] U.S.C. § 1413, a savings provision specifying that the Act does not waive a Member's Speech or Debate privilege. But Congress agreed with *Forrester* and did not view routine employment decisions as legislative acts entitled to immunity. Instead, section 413 was aimed at preserving Members' evidentiary privilege, *i.e.*, to be able to refuse to answer questions about true legislative acts. For example, a Member could not be questioned about a vote on a

bill or a speech on the floor, no matter how probative that evidence might be for a plaintiff's claims.

There was no opinion for the D.C. Circuit on the proper way to treat issues of evidentiary privilege under the Speech or Debate Clause, as Judge Rogers, the fifth member of the opinion for the court on most issues, declined to concur on this one. *See* J.S. App. 29-30. She believed "the court need not address what happens when legislative acts arise as potential evidence in varying contexts in CAA litigation," and "[a]ttempts to signal the answers to such questions are fraught with problems." *Id.* at 29a.

Judge Tatel similarly felt that questions about the proper application of the evidentiary privilege will be "more easily answered after further factual development." J.S. App. 31a. Judge Tatel also noted that all members of the *en banc* court agreed that "the question of what precisely the Clause precludes is best resolved on a case-by-case basis." *Id.* "Because such determinations will necessarily be fact-bound, it is appropriate that we announce no blanket rule today," and instead allow "the district courts [to] develop the factual records." *Id.* at 35a.

It is sensible to defer making "blanket rules" concerning the application of the Speech or Debate Clause's evidentiary privilege to this case. No discovery has been taken, so such questions are premature. In any event, appellant seeks review only of the threshold issue of jurisdiction, which the court below unanimously—and correctly—decided against it.

It is unlikely that further litigation in this case will get anywhere near legislative acts, because appellant has already conceded that Hanson's firing was not related to his work on legislation. As noted in the Statement, the Office of Senator Dayton filed an answer to Hanson's complaint in district court, asserting that he was fired because he mismanaged the Health Care Help Line, which assisted constituents who

had problems with their health insurance carriers, HMO's or physicians.

The Help Line, although legitimate, was not legislative in character. The Line originated as a campaign asset during Senator Dayton's election campaign in 2000. Hanson designed and ran it, and it certainly was not a legislative activity before Senator Dayton was even elected. Nor was it thereafter.

Instead, the Health Care Help Line was among the "wide range of legitimate 'errands' performed for constituents" that are "political in nature rather than legislative." *Brewster*, 408 U.S. at 512. Indeed, the crux of appellant's defense appears to be that Senator Dayton did not know that Hanson needed heart surgery at the time he made the decision to fire him. See Br. App. 1a, ¶ 1. That defense has nothing whatever to do with legislative acts. This case poses no threat to legislative independence and is not barred by the Speech or Debate privilege.

II. THIS APPEAL SHOULD BE DISMISSED

Appellant says that section 412 of the CAA, 2 U.S.C. § 1412, which provides that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," authorizes a direct appeal to this Court from the decision of the D.C. Circuit. Appellee argued in the Motion to Dismiss or to Affirm that appellant did not have the right of direct appeal from a court of appeals to this Court—that such appeals could only come from district courts. Appellee also argued that the Office should have appealed to the Court from the district court's minute order denying the motion to dismiss.

The argument against appeals from federal appellate courts was based in part on the unlikelihood that Congress would authorize a direct appeal from a court of appeals so soon after abolishing most of the Court's appellate jurisdiction—including all direct appeals from courts of appeals—in Pub. L. 100-352, 102 Stat. 662 (1988). In fact, we were wrong. Research for this brief has revealed that Congress authorized a post-1988 appeal from a court of appeals in the Government Employee Rights Act (GERA), which was Title III of the Civil Rights Act of 1991. In particular, Congress provided for direct appeal from decisions of the Court of Appeals for the Federal Circuit on the constitutionality of certain provisions of GERA. *See* section 325(c) of GERA, *formerly* 2 U.S.C. § 1224(c). GERA was a predecessor of the CAA, so it is possible that Congress likewise intended to authorize appeals from decisions of courts of appeals in the Accountability Act, too.

Second, on the question whether the district court's minute order could be directly appealed, we believed that the court's order necessarily rejected the merits of appellant's argument, and that a rejection of the merits satisfied the criteria in 2 U.S.C. § 1412. This is problematic. In the absence of an opinion, it is impossible to know whether the district court denied appellant's motion simply because facts were in dispute, as opposed to an examination of the merits. *See* n.3 above. Perhaps more important, the decision of the D.C. Circuit shows that it is possible to address the merits of appellant's argument without satisfying the standards for direct appeal in 2 U.S.C. § 1412, especially since those criteria must be strictly applied. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983) ("statutes authorizing appeals are to be strictly construed"). Quite simply, there is nothing in Judge Randolph's opinion for the court deciding "the constitutionality of any provision" of the CAA.

In sum, the district court's minute order was not subject to direct appeal, because the absence of an opinion makes it impossible to tell whether § 1412's standards are met. And since there could not have been a direct appeal from the district court, the remedies in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982), do not apply.

Nor is direct appeal possible from the decision of the D.C. Circuit—not because appeals are no longer possible from judgments of circuit courts, but simply because the criteria of § 1412 are not satisfied. That means the appeal here should be dismissed.

Certiorari should not be granted, not only because experienced counsel deliberately opted for appeal, but principally because appellant does not meet the standards of the Court's Rule 10—there is no division in the circuits, and the D.C. Circuit was faithful to the Court's Speech or Debate Clause and related precedent. Still, certiorari is a much more flexible tool than the appeals process. If the Court desires to address the merits of this case, appellee believes that granting certiorari would be preferable to dealing with this case as an appeal, with the attendant risk that CAA discovery disputes with Speech or Debate overtones would be appealed. *See* Brief for the United States Senate as *Amicus Curiae* at 12.

III. THIS CASE IS NOT MOOT

Senator Dayton chose not to seek reelection. Now the Office of Senator Dayton argues that the Senator's voluntary departure from Congress moots this case and requires vacating all prior judicial decisions. This argument contravenes the language, structure and purpose of the CAA, as well as judicial precedent on abatement generally. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 2005 WL

3334359 (D.Colo. 2005) (rejecting claim of abatement after Senator Nighthorse Campbell left office).[22]

The expiration of a Member's term of office does not moot a case so long as there is a live dispute for which relief can be provided. In *Davis v. Passman*, for example, Congressman Passman was defeated for reelection in a primary in 1976, 442 U.S. at 230 n.1, three years before the Court affirmed the existence of a *Bivens*-style discrimination claim against him in federal court. Still, the Court saw the case as very much alive, because monetary damages were available: "since respondent is no longer a Congressman . . . equitable relief in the form of reinstatement would be unavailing. * * * For Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 245. *See also Powell v. McCormack*, 395 U.S. at 498 (claim for back pay meant that Adam Clayton Powell's lawsuit was not moot, even though his reelection resulted in his return to Congress).[23]

The parties contest Hanson's entitlement to back pay or damages, and appellant is vigorously represented by counsel provided by the Senate. If Hanson prevails, there is a fund available to satisfy the judgment. 2 U.S.C. § 1415. These are not the indicia of a moot case.

Abatement is an extreme measure resulting in the immediate cessation of all pending claims and requiring that prior judicial decisions be vacated. At common law, issues of abatement would arise when a necessary party to litigation

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[22] Appellant is wrong to suggest that sovereign immunity plays any role here: "Congress . . . unequivocally waived the sovereign immunity of a Member's personal office facing [CAA] allegations." J.S. App. at 11a.

[23] In a firing case, reinstatement is the only element of relief that ordinarily would be affected by a Member's departure from office. Long before Senator Dayton announced his decision not to run for reelection, Hanson stipulated that he was not seeking an order requiring his return to the job and would instead accept monetary relief. *See* JA 20.

ceased to exist, for instance, when a natural person died or when a corporation took the affirmative steps necessary to extinguish operations, such as filing articles of dissolution. Findings of abatement are now rare, because state laws routinely provide a mechanism for resolving pending litigation even where an individual dies or a corporation dissolves. *See, e.g., Melrose Distillers Inc. et al., v. United States*, 359 U.S. 271, 272 (1959) (dissolution of corporation did not abate Sherman Act prosecution). Similarly, lawsuits against public officials frequently raised issues of abatement until the rules of this Court (Rule 35.3) and the Federal Rules of Civil Procedure more broadly (Rule 25(d)) cured the problem by specifying that cases do not abate when officials leave public office. Instead, any successor to the office automatically is substituted as a defendant and the suit continues, unabated.[24]

When Congress creates a governmental instrumentality capable of being sued, abatement is accomplished *only* by an express act abolishing the defendant. *See Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1312 (11th Cir. 2006) ("On September 30, 2004, while Appellants' suit was pending, Congress passed a joint resolution that amended the Act and terminated the PCC and OTA as of October 1, 2004."); *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 636 (1949) (Congress expressly dissolved the Defense Supplies Corporation through a Joint Resolution); *Skolnick v. Parsons*, 397 F.2d

[24] Even where no successor to office can be found, cases do not ordinarily abate. For example, in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 672 (U.S. 1996), the plaintiff (an independent contractor) sued alleging that his contract with the city to haul trash was terminated because of his protected First Amendment speech. During the appeal, "the Board members who were the original defendants in this suit subsequently resigned their positions on the Board, so in this Court, the Board was substituted for them as petitioner. See this Court's Rule 35.3." *Id.* The Court did not hold that the Board members' departure from office, without identified successors, resulted in abatement.

523, 524 (7th Cir. 1968) (the President's Commission on Law Enforcement and Administration of Justice "terminated by Presidential Order prior to the filing of the complaint."). In these circumstances, the intention to abolish is manifest in the statute or executive action. That is not true here.

Appellant assumes than when Senator Dayton left the Congress and closed his office door for the last time, the Office of Senator Dayton ceased to exist. But the Office is a term of art (Representative Fawell called the concept of employing office a "term of new art," 141 Cong. Rec. 1337), a "legal fiction" created expressly for purposes of the CAA. Hyde *Amicus* Brief at 10. Thus the Act must be examined to see if a Member's departure from Congress affects the Office's continued existence.

The CAA created the employing office as an instrumentality capable of being sued. 2 U.S.C. § 1408(b). The statute contains just one condition for establishing jurisdiction in federal court—that the employee's claim was timely submitted to an internal counseling and mediation procedure prior to filing suit. *Id.* at § 1408(a). The CAA does not state or in any way imply that jurisdiction is extinguished on the last day of a Member's term of office.

Similarly, there is nothing in the special judgment fund established by 2 U.S.C. § 1415 that says that the fund may not be used to satisfy judgments after a Member leaves office. Appellant refers to the Senate Handbook, but that volume sets forth procedures only for closing the Senators' Official Personnel and Office Expense Account. *See* 2 U.S.C. § 58c. If Congress had provided that CAA judgments were to be paid from that account, appellant would have a better case for mootness. But Congress did not, and it made sure the Members knew it. *See* S.Rep. 103-397 at 29.

We showed in Section I.E.2 above that a CAA suit is against Congress generally, just as a Title VII lawsuit by a federal employee is against the United States, even though the

statute requires that the agency head be named as the defendant. 42 U.S.C. § 2000e-16(c). This means that a particular Member's continued tenure in office is not a prerequisite to federal court jurisdiction.

Judge Brown commented below on the unique structure of the CAA:

> The personal office of a member . . . is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor a chartered corporation, nor a trust, nor a partnership. It is an organizational division within Congress, established for Congress' administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of Congress, as to whom the member (acting on behalf of Congress) has supervisory control.

J.S. App. 47a.

Counsel made the same mootness argument following the remand in *Bastien*, since Senator Nighthorse Campbell, like Senator Dayton here, had voluntarily relinquished his Senate seat. The district court analyzed the language, structure and underlying purpose of the CAA and ruled that claims under the CAA do not abate upon expiration of a Member's term:

> [t]he court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

2005 WL 3334359 at *3.

Adoption of appellant's argument on mootness would have harsh consequences. A Senator in the final months of his term could harass his staff with impunity, comfortable in the knowledge that no claim could be completed before he departed. Employees of Representatives would have no assurance that litigation—including appeals—would be finished before the Member left office. A Member in either House could pull the plug on a claim at any point by resigning, depriving the aggrieved employee of any hope of remedy. Committee staffers in contrast, would go to the head of the line, knowing that their claims—unlike those of their colleagues in Members' offices—would go to final judgment, even though Congress intended to treat its employees equally. *See, e.g.*, 141 Cong. Rec. S447 (Sen. Glenn).

In the absence of compelling evidence from the text of the CAA or its history, it is unreasonable to conclude that Congress wrote this landmark reform legislation in a way that would permit its Members easily to avoid responsibility for unlawful conduct. In fact, though, all indicators point in the direction of enhancing congressional accountability.

A lawsuit under the CAA is against the Congress. The employing office is a stand-in for Congress. This case is not moot.

IV. POSTSCRIPT

Concerned about the perverse implications of its position, appellant says there are some matters that even an employee with legislative duties may challenge under the CAA. The example is sexual harassment that progresses to the point of producing a hostile work environment. Brief for Appellant at 31-32. Appellant contrasts this type of unlawful employment practice with a "discriminatory termination," for which "the Speech or Debate Clause bars adjudication." *Id.* at 32 n.12.

But what if the hostile environment culminates in a discharge, as frequently happens? The Court has held that, in

this circumstance, the dismissal is a tangible employment action whose presence deprives the employer of an affirmative defense to the imposition of vicarious liability. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

A hostile work environment is a serious matter. A hostile environment culminating in a firing is doubly serious and results without more in vicarious liability for the employer. Yet appellant's theory would only provide protection from the less serious violation. A statutory interpretation with such anomalous consequences should be avoided.

The text, structure and history of the Congressional Accountability Act are clear, as are this Court's precedents. Federal courts have jurisdiction over all properly instituted CAA claims.

CONCLUSION

The appeal should either be dismissed or the judgment below affirmed. If the Court treats appellant's papers as a petition for certiorari, the petition should be denied. If the petition is granted, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:03CV01149 (RJL)

BRAD HANSON,

Plaintiff,

v.

OFFICE OF SENATOR MARK DAYTON

Defendant.

ANSWER TO COMPLAINT

The Office of Senator Mark Dayton, for its answer to the Complaint in the above-captioned matter, states as follows:

1. In response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton admits only that Brad Hanson ("Mr. Hanson" or "Plaintiff") worked for Mark Dayton's 2000 Senate campaign and worked in the Office's Fort Snelling, Minnesota location after Mr. Dayton was elected to the Senate. The Office of Senator Mark Dayton denies each and every remaining allegation set forth in paragraph 1 of the Complaint. The Office of Senator Mark Dayton expressly denies that Mr. Hanson was terminated because he needed heart surgery or for any other health-related reason. When he terminated Mr. Hanson, Senator Dayton was completely unaware that he reportedly needed heart surgery. Mr. Hanson was terminated because of his poor job performance over an extended period of time.

Mr. Hanson did not fulfill his job obligations to help the people of Minnesota. His job responsibilities encompassed, among other things, issues that were at the heart of Senator

Dayton's constitutional obligation to represent his constituents, and Senator Dayton could not effectively meet those obligations when Mr. Hanson failed to perform his job. At the time Mr. Hanson was terminated, he had failed to process and otherwise respond to approximately 150 matters that constituents had brought to his attention. Those matters raised serious healthcare-related issues the constituents wanted and needed to have the Office of Senator Dayton address and resolve. Moreover, the concerns raised by constituents guide Senator Dayton in determining what legislation he should sponsor, support or oppose. In addition, Mr. Hanson left work in the middle of the afternoon when he should have been working. When he was in the office and should have been working, he was observed by staff members to be sleeping at his desk on more than one occasion; he was also observed watching non-Senate related television, including daytime soap operas and sports, with his feet propped on his desk, when he should have been working. That lack of commitment to Minnesota was unacceptable to Senator Dayton. In further response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton expressly denies that Mr. Hanson was unaware that Senator Dayton was unhappy with his job performance. Beginning in December 2001 and consistently thereafter, Senator Dayton told Mr. Hanson that he showed a lack of initiative to increase public awareness of the availability of the Health Care Health Line ("HCHL"). Moreover, Senator Dayton instructed Mr. Hanson to implement a system to tabulate the number of HCHL cases, but Mr. Hanson adamantly resisted doing so, claiming that it was impossible.

In further response to paragraph 1 of the Complaint, the Office of Senator Mark Dayton states that when Mr. Hanson was hired, Senator Dayton was aware that Mr. Hanson claimed to have some heart condition. It is not credible that the Office would have terminated Mr. Hanson for a condition that Senator Dayton was aware of at the time Mr. Hanson was hired.

2. In response to paragraph 2 of the Complaint, the Office of Senator Mark Dayton states as follows. The Office of Senator Mark Dayton denies each and every allegation set forth in paragraph 2 of the Complaint except admits that Plaintiff purports to bring this lawsuit as he alleges. Article I, section 6, clause 1 of the U.S. Constitution provides absolute immunity to the Office of Senator Mark Dayton; therefore, this Court lacks subject matter jurisdiction of this action.

3. In response to paragraph 3 of the Complaint, the Office of Senator Mark Dayton states as follows. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or to deny the allegation that Plaintiff is a lifelong resident of Minnesota. The Office of Senator Mark Dayton admits that Plaintiff has known Senator Dayton for many years, their families have been friendly, and Plaintiff is a "covered employee" within the meaning of 2 U.S.C. § 1301(3). The Office of Senator Mark Dayton denies each and every remaining allegation of paragraph 3 of the Complaint and expressly denies that Mr. Hanson was unlawfully fired.

4. The Office of Senator Mark Dayton admits the allegations set forth in paragraph 4 of the Complaint except denies that the Office is a personal office of Senator Dayton; rather the Office is a United States government office, paid for by the taxpayers of the United States of America.

5. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 5 of the Complaint except admits that Plaintiff joined Mark Dayton's Senate campaign in July 2000 and that during the campaign Mr. Hanson was one of those who ran the HCHL, an advocacy program conceived and initiated by candidate Dayton that assisted people having difficulties with health insurance carriers, HMO's and Medicare, and that Mr. Hanson did a good job at the outset and that Senator Dayton complimented him for that work. The Office of Senator Mark Dayton expressly denies that Mr.

Hanson designed the HCHL program; rather, the idea for the HCHL was entirely and originally Senator Dayton's.

6. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 6 of the Complaint except admits that Plaintiff began working for the Office of Senator Mark Dayton in January 2001 at an annual salary of $45,000, that Plaintiff's title when he began his employment with the Office of Senator Mark Dayton was Office Manager/ Caseworker, that Plaintiff assisted in setting up Senator Dayton's Minnesota state offices in Fort Snelling, Thief River Falls, and Ely, Nowabik, and that Plaintiff oversaw the transition of HCHL to the Office of Senator Mark Dayton. The Office of Senator Mark Dayton expressly denies that Mr. Hanson was ever denied any overtime pay.

7. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 7 of the Complaint except admits that Plaintiff worked in Senator Dayton's Fort Snelling office and that Mr. Hanson did a good job at the outset for which Senator Dayton complimented him.

8. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or to deny the allegations set forth in paragraph 8 of the Complaint.

9. Except as expressly admitted or otherwise averred herein, the Office of Senator Mark Dayton denies each and every allegation set forth in paragraph 9 of the Complaint. The Office of Senator Mark Dayton admits that Senator Dayton planned to and did go to the Fort Snelling office on July 3, 2002. Prior to that meeting, Senator Dayton had resolved to terminate Mr. Hanson, and, therefore, a principal purpose for this meeting was to terminate Mr. Hanson. The Office of Senator Mark Dayton also admits that Mr. Hanson told Senator Dayton's scheduler that Mr. Hanson wanted to make sure that he was on Senator Dayton's schedule for a July 3 meeting and that Mr. Hanson told co-workers that he

needed heart surgery. Although Mr. Hanson discussed his need for surgery with some co-workers and told them he wanted to meet with Senator Dayton on July 3, at no time did he mention to those co-workers or anyone else that he was going to tell Senator Dayton that he needed surgery. In fact, Mr. Hanson told his co-workers that the reason he wanted to meet with Senator Dayton on July 3 was to discuss the problems with the HCHL program. At no time prior to his termination did Mr. Hanson or anyone else tell Senator Dayton that Mr. Hanson needed heart surgery. In fact, when Senator Dayton terminated Mr. Hanson, he was completely unaware that Mr. Hanson needed heart surgery. Senator Dayton is and always has been a strong proponent of assisting individuals with their health-related problems. It would be against all his principles to terminate an employee because the employee needs surgery. In further responding to paragraph 9 of the Complaint, the Office of Senator Mark Dayton states that it is without knowledge or information sufficient to allow it to admit or to deny the allegations regarding Plaintiff's wanting to tell Senator Dayton personally about his need for an operation.

10. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 10 of the Complaint except admits that Plaintiff met with Senator Dayton on July 3, 2002, at his Fort Snelling office and that at a subsequent staff meeting Senator Dayton informed the staff that Plaintiff's employment with the Office had ended. The July 3 meeting began with Mr. Hanson launching into a tirade against other office staff. Mr. Hanson told Senator Dayton that there were serious problems in the office, and Mr. Hanson blamed them on two other supervisory staff, and he called for their termination. Senator Dayton then informed Mr. Hanson that, prior to the meeting, Senator Dayton had concluded that the HCHL's problems were caused by Mr. Hanson's poor performance and that Mr. Hanson, not other supervisors, had to leave the Office. Senator Dayton told Mr. Hanson that he was therefore

terminated, or he could choose to resign. Only after Mr. Hanson had been terminated and at the conclusion of this conversation, did he inform Senator Dayton that he was going to the Mayo Clinic the following week; Mr. Hanson offered no other information about his health, nor, out of respect for Mr. Hanson's privacy, did Senator Dayton ask.

11. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 11 of the Complaint except admits that Plaintiff was kept on the payroll through September 30, 2002, was taken off the payroll on September 30, 2002, and that Matt McGowan, the Office Manager, spoke with him by telephone on or about July 17, 2002, to inform him that his last day on the payroll would be September 30, 2002. Mr. McGowan also told Mr. Hanson that Senator Dayton would personally pay one year of Mr. Hanson's healthcare premium and his wife's family health club membership, which Senator Dayton had previously gifted to her for her healthcare treatment.

12. The Office of Senator Mark Dayton is without knowledge or information sufficient to allow it to admit or deny the allegations set forth in paragraph 12 of the Complaint.

13. The Office of Senator Mark Dayton denies the allegations set forth in paragraphs 13 and 14 of the Complaint.

14. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 15 of the Complaint, except the Office of Senator Mark Dayton admits that Plaintiff engaged in counseling under 2 U.S.C. § 1402 and mediation under 2 U.S.C. § 1403.

15. For its answer to paragraph 16 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

16. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 17 of the Complaint.

17. For its answer to paragraph 18 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

18. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 19 of the Complaint.

19. For its answer to paragraph 20 of the Complaint, the Office of Senator Mark Dayton incorporates paragraphs 1-14 of this Answer as if set forth here at length.

20. The Office of Senator Mark Dayton denies the allegations set forth in paragraph 21 of the Complaint.

21. The Office of Senator Mark Dayton denies the allegations set forth under Plaintiff's "Request for Relief," including, but not limited to, subparagraphs numbered 1-7, except the Office of Senator Mark Dayton admits that Plaintiff requests the relief set forth under "Request for Relief," and the Office of Senator Mark Dayton expressly denies that Plaintiff is entitled to any of the relief requested or any other relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

22. The Office of Senator Mark Dayton has absolute immunity under the Speech or Debate Clause of the U.S. Constitution (U.S. Const., art. I, § 6, cl. 1), and the Office of Senator Mark Dayton has not, and does not, waive that immunity. Rather, the Office of Senator Mark Dayton expressly preserves its Speech or Debate immunity.

SECOND AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

23. To the extent Plaintiff asserts in this action any claim for which he failed timely to file a request for counseling or a

request for mediation and/or any claim that was not raised in his request for mediation, such claims are barred due to a failure to exhaust administrative remedies. *See* 2 U.S.C. §§ 1401, 1402, 1403, 1404 and 1408.

THIRD AFFIRMATIVE DEFENSE
(Lack of Subject Matter Jurisdiction)

24. To the extent Plaintiff alleges that the Office of Senator Mark Dayton committed illegal acts other than those prohibited by the Congressional Accountability Act ("CAA"), 2 U.S.C. §§ 1301-1438, the Court lacks jurisdiction over his claims.

FOURTH AFFIRMATIVE DEFENSE
(Failure to State a Claim for Relief)

25. The Complaint fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

26. To the extent Plaintiff did not file a request for counseling with the Office of Compliance within 180 days of the alleged violation(s) of the CAA, his claim with respect to such alleged violation(s) is barred by the statute of limitations set forth in section 402 of the CAA, 2 U.S.C. § 1402.

SIXTH AFFIRMATIVE DEFENSE
(Injury Caused by Others)

27. To the extent Plaintiff has suffered any injury or damages, such injury or damages were not caused by the acts or omissions of the Office of Senator Mark Dayton, but by the acts or omissions of Plaintiff or of others.

SEVENTH AFFIRMATIVE DEFENSE
(Non-discriminatory Reasons)

28. The Office of Senator Mark Dayton's decisions with respect to Plaintiff's employment were based on legitimate, non-discriminatory reasons.

EIGHTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

29. On information and belief, Plaintiff has failed to mitigate his damages, and to the extent of such failure to mitigate, any damages awarded to Plaintiff should be reduced accordingly.

NINTH AFFIRMATIVE DEFENSE
(Bad Faith)

30. Having brought this action in bad faith, Plaintiff must reimburse the Office of Senator Mark Dayton for its attorneys' fees and costs.

TENTH AFFIRMATIVE DEFENSE
(Exclusive Statutory Remedy)

31. The exclusive remedy for the claims asserted by Plaintiff is provided by the CAA. To the extent Plaintiff seeks relief that is not available under the CAA, the Court is without jurisdiction to grant the relief requested.

ELEVENTH AFFIRMATIVE DEFENSE
(Performance of Duties)

32. The Office of Senator Mark Dayton has performed fully any and all contractual, statutory and other duties to Plaintiff, and therefore Plaintiff is estopped to assert any claim or cause of action against the Office of Senator Mark Dayton.

TWELFTH AFFIRMATIVE DEFENSE
(Frivolous)

33. The allegations and claims asserted in the Complaint have always been and continue to be frivolous.

THIRTEENTH AFFIRMATIVE DEFENSE
(Estoppel)

34. Any of the conduct of the Office of Senator Mark Dayton that is alleged to be unlawful was taken as a result of conduct by Plaintiff, and Plaintiff therefore is estopped to assert any cause of action against the Office of Senator Mark Dayton.

FOURTEENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

35. To the extent Plaintiff has unclean hands, he is barred from equitable relief in this action.

FIFTEENTH AFFIRMATIVE DEFENSE
(Mixed Motive)

36. Even if the Office of Senator Mark Dayton took adverse action against Plaintiff in part because of an illegitimate motive, which it did not, the Office of Senator Mark Dayton would not be liable under the CAA or would have only limited liability if the Office of Senator Mark Dayton would have taken the same action even in the absence of the illegitimate motive.

WHEREFORE, the Office of Senator Mark Dayton, prays that Plaintiff take nothing by his Complaint, that the Complaint be dismissed in its entirety, that the Office of Senator Mark Dayton be awarded its attorneys' fees and costs, and that the Court award to the Office of Senator Mark Dayton such other relief as it deems just and proper.

Dated: September 21, 2004

Respectfully submitted,

/s/ Jean M. Manning
Jean M. Manning
Senate Chief Counsel for Employment
D.C. Bar No. 439942

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Appearance pursuant to LCvR 83.2(e)

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